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A Conflict of Rights:

What Circumstances Justify Military Intervention in Humanitarian Crises?

*Paper submitted in partial fulfilment of the requirements for the Degree of
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by

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A Conflict of Rights: What Circumstances Justify Military Intervention in Humanitarian Crises?

The use of deadly force in order to save lives raises many issues. For example, one immediately wonders if more innocent lives will be lost by military action than will be saved; on the other hand, one could also ask if inaction in the face of genocide or ethnic cleansing can be justified. Another issue involves the threshold for intervention: what abuses, on what scale, should trigger armed action? In addition, one must consider the morality and practicality of states interfering in the domestic affairs of other sovereign states.

Over the years, the international community has developed a series of norms and doctrines that address the issues raised by humanitarian intervention. The legal framework currently places serious restrictions on any use of force, including force used in the name of human rights. The presumption is in favour of the sovereignty of the state, and any intervention must be justified as an exception.

However, there is evidence that the international consensus is becoming more accommodating of military action in cases of gross violation of human rights. It cannot yet be said that the presumption has moved in favour of human rights over state sovereignty, but the primacy of sovereignty and the doctrine of nonintervention seem to have been weakened.

This paper will examine that trend, and will be divided into four sections. In the first, the development of the state system will be described. This section will explain how the idea of state sovereignty developed and became the centrepiece of the international system, yet the corollary norm of nonintervention became secondary to other interests. This section will also

describe how the primacy of state sovereignty has been weakened in recent decades by the emergence of non-state actors as subjects of international law, as well as by treaties and agreements that address issues traditionally held to be the exclusive domain of states.

The second section will describe the legal framework relating to humanitarian intervention. Since the bulk of the framework is found in the Charter of the United Nations, this section will concentrate on the relevant articles of this instrument.

In the third section, the NATO intervention in Kosovo is used as a vehicle to illustrate the legal issues described in the first two sections. This will expose the contradictions between theory and reality, and raise the issue of whether the legal framework supports the consensus of the international community.

The final section will draw conclusions concerning the legitimacy of military force in humanitarian crises, and where the consensus on the issue is heading.

An attempt to examine the full range of issues associated with humanitarian intervention would be lengthy and beyond the scope of this project. While recognising the importance of the ethical and sociological dimensions of this problem, this paper will focus on legal, political, and historical issues.

Before beginning, it is important to note that the term humanitarian intervention can be interpreted in a number of ways. It certainly involves a level of coercion against a state or government, with the end of protecting essential rights of a population. John Vincent defined humanitarian intervention as ‘...that activity undertaken by a state, a group within a state, a

group of states or an international organisation which interferes coercively in the domestic affairs of another state.' (Vincent 1974: 13). Vincent's definition includes means short of force. A more limited definition of humanitarian intervention is '...coercive action by states involving the use of armed force in another state without the consent of its government, with or without authorisation from the United Nations Security Council, for the purpose of preventing or putting to a halt gross and massive violations of human rights or international humanitarian law.' (Danish Institute 1999:11) This paper will focus on military humanitarian intervention, the subset of humanitarian intervention that involves the use of military force, rather than coercion through means short of force. This definition excludes the use of military personnel in a post-conflict scenario for tasks such as peacekeeping or nation-building. Only cases involving the application of firepower to end humanitarian crises are considered.

SECTION 1. SOVEREIGNTY, INTERVENTION, AND THE INTERNATIONAL SYSTEM

Development of Sovereignty

The presumption in favour of sovereignty is an outgrowth of the development of the international system. In post-Roman Europe, the Church dominated all forms of human endeavour, including what would today be called international affairs. Because of this, a moral/theological grounding was sought for relations between rulers. Force was acceptable, provided it was in accord with the will of God (Shaw 1997:778). Saint Augustine wrote that a war was 'just' if it punished a wrongful act and returned the situation to the status quo ante (Shaw 1997: 778). Several centuries later, writing in his *Summa Theologica*, Saint Thomas Aquinas took a slightly different approach; rather than righting a wrong, war should punish subjective guilt. Aquinas held that wars were just, provided they met three criteria:

- they were carried out by a sovereign authority (as God's power on Earth)
- they punished a sin
- and they were supported by the right intentions (as opposed to desire for land, money, or power) (Shaw 1997: 778)

Despite the supranational role of the Church, rulers acquired a greater degree of personal power as larger states absorbed smaller states. Rulers were responsible for maintaining order over larger areas. Their need to maintain order led to an 'absolutist' approach to governance, in which the power of the king was unquestioned (Held 1995:46). Bodin, writing in 1577, justified absolutism in this manner:

'It is necessary that those who are sovereigns should not be subject to commands emanating from any other and that they should be able to give laws to their subjects...but this cannot be done by one who is subject to the laws or to those who have the right of command over him.' (Kratochwil 1995: 23)

This concept of 'sovereignty' became a means of asserting royal authority over lesser barons and the general population. (Lyons and Mastanduno 1995: 5).

The Holy Roman Empire had a great deal to do with the growth of secular absolutism, since it had provided the counterbalance to Rome's religious authority for centuries. A new challenge arose in the form of the Reformation. Obviously this movement presented a threat to the power of the Catholic Church, but it also challenged the authority of the Catholic Habsburg rulers who controlled the Empire. A number of principalities within the Empire (and elsewhere) became Protestant, creating tensions not only with the Emperor but also with neighbouring Catholic principalities. An early attempt to solve the problem of religious conflict was the Peace of Augsburg (1555). This treaty acknowledged the division of the Empire into Lutheran and Catholic areas and gave each prince the sole authority for deciding the religion of his dominion. This solution confirmed 'the absolute rights of sovereignty and nonintervention' (Krasner 1995:

234). The Augsburg solution was not sufficient to prevent further religious strife in Germany and elsewhere. In 1618 the Habsburgs attempted to eradicate Protestant influence in Bohemia, precipitating the Thirty Years War (ibid.). The Peace of Westphalia (1648) was written at the conclusion of the war, and was to a great extent a reaction to the destruction engendered by religious fervour and conflict among rulers. Under the agreements comprising the Peace of Westphalia,

‘the sovereign right of the state to act as supreme arbiter within its national borders and to be the absolute priority of the interests of the state (*raison d’etat*) and maintenance of security within the parameters of the balance of power – were the universal fundamentals of European and later world politics.’ (Kulagin 1999).

By recognising the legitimacy of Lutheran and Calvinist states, the agreements confirmed the independence of the State from the (Catholic) church; and by granting principalities within the Empire limited rights to enter alliances and wage war, the agreements significantly weakened the Holy Roman Empire. The Peace of Westphalia ‘testified to the rapid decline of the Church...and to the *de facto* disintegration of the Empire’ (Cassese 2001: 21). With the two supranational institutions thus weakened, nation-states emerged as supreme entities that were not required to conform to the orders of a higher authority.

Until this point, ‘international affairs’ were a matter of relations between sovereigns – that is, between individuals who ruled by authority of divine mandate. The concept now arose of an amorphous, impersonal entity – the nation-state. States became the central actors and exclusive subjects of international law, rather than individuals (i.e., rulers) as before (ibid.). Only recently has there been significant development of a notion of individuals and other non-state entities as actors and subjects of international law.

Although the Westphalian system emphasised the juridical equality and absolute sovereignty of states, European leaders did recognise differentials in power and the consequences that could ensue for stability. Four institutions emerged to promote peaceful resolution of conflicts:

- a balance of power system to prevent one dominant power from committing aggressive acts
- a codified set of rules to regulate relations among states
- international conferences in which states could discuss and defuse emerging conflicts
- the diplomatic system (Lyons and Mastanduno 1995: 6).

Intervention in the Westphalian System

State sovereignty was the core of the Peace of Westphalia, and a doctrine of nonintervention would be a natural corollary of this notion. Nevertheless, the Westphalian system endorsed intervention should the four institutions fail to protect stability. According to Krasner, 'the norm of nonintervention was not reflected at all in the Peace of Westphalia' (Krasner 1995: 236).

The eighteenth century saw great movements in political thought that altered the character of states. These new philosophies played a role in the American and French Revolutions, and the subsequent rise of republicanism tested the effectiveness of the Westphalian system in ensuring stability. At the conclusion of the Napoleonic Wars, the Congress of Vienna attempted to address the failure of the system to maintain stability. Mechanistic adjustments to the balance of power were abandoned in favour of a system of hegemony among the Great Powers (Lyons and Mastanduno 1995: 6). This system led to the Holy Alliance, formed in 1815, and including Austria, Prussia, and Russia (Krasner 1995: 242); the UK and France were added by 1818

(Cassese 2001: 25; Chesterman 2002: 22-23n).¹ An important purpose of the alliance was to prevent republican movements from taking power in any state and thus threatening the stability of Europe. The Alliance was explicitly interventionist in nature; the 1820 Protocol to the Treaty of Paris authorised intervention by Alliance members to put down revolution in European states (ibid.)². In fact, intervention was common in the early nineteenth century. Any hesitancy to intervene was not due to a perceived norm of nonintervention, but rather 'the balance of interests among major powers' (Krasner 1995: 245). For example, Britain's opposition to Russian intervention in the Balkans and French action in Iberia were due to its desire to maintain the balance of power (ibid.)

Although nonintervention was a principle of international relations in the nineteenth century, state practice indicated that it was not considered inviolable. Shaw states that it 'may very well have been the case that in the last century such intervention was accepted under international law' (Shaw 1997: 802). Cassese elaborates on this notion: 'In the period before 1945, States did not have to comply with these rules if they considered that their interests overrode the rules' and that, in such cases, states were '*legally authorised* to disregard the rules in question and intervene by force' (Cassese 2001: 98; emphasis added). Lillich agrees, asserting that in the nineteenth century 'despite the doctrine of absolute sovereignty...a decent respect for human dignity permitted the imposition of some minimum limitations upon this concept' (Lillich, in Dixon and McCorquodale 2000: 576).

¹ Some sources refer to the Holy Alliance as including all five states mentioned above (Cassese 2002: 25); others distinguish between the original three members (Holy Alliance) and the group of five (Quintuple Alliance or Pentarchy) (Chesterman 22-23). In this paper the Holy Alliance will refer to the group of five states, except where noted.

² This interventionist orientation was strongest in Austria, Russia, and Prussia; the UK was in fact hesitant to intervene to suppress republicanism. See Krasner 244.

The First World War disproved the assumption that the system established at Westphalia and refined through the Concert of Europe would prevent instability and conflict. At the end of the war, the priority of the international community was to regulate closely the use of force. The Covenant of the League of Nations required states involved in a dispute to submit the matter to the League's Permanent Court of International Justice (Collins 1970: 338). Furthermore, a three-month interval was mandated between the Court's issuance of a decision and the beginning of any hostilities (Connaughton 2001: 6). However, the League did not have any credible enforcement mechanism, and could only recommend action (Covenant of the League of Nations, Article 16 (2))³. The Briand-Kellogg Pact of 1928 went further, ostensibly banning war altogether; however, it allowed for a very liberal interpretation of the right to self-defence. Britain reserved the right to intervene in areas of specific importance to its empire, and the U.S. held that self-defence included its right to intervene in accordance with the Monroe Doctrine (Cassese 2001: 33).

Despite the efforts of the League and the Briand-Kellogg Pact, armed conflict continued in the interwar years. The League of Nations, already weakened by wars in the Far East, Spain, and Ethiopia, collapsed with the outbreak of the Second World War.

The world community recognised the failings of the League, but still believed in the necessity of an international organisation to promote peace and stability. The Charter of the United Nations was written in an attempt to preserve peace while addressing the perceived failings of previous efforts. The specifics of the Charter will be addressed in detail in a later section. In short, the Charter specifies a ban on the use or threat of force (Article 2(4)) and emphasises the sovereignty

³ See Appendix for this and other relevant articles cited in this paper.

of states (Article 2(7)). There are limited exceptions to both of these Articles, found in Chapter VII of the Charter.

This historical review indicates that the supremacy of state sovereignty in international relations developed over time, but became indisputable following the Peace of Westphalia. However, the corollary of nonintervention was not followed in practice. It was not until after the First World War, and more precisely with the writing of the UN Charter after the next war, that a true doctrine of nonintervention emerged and became a binding norm of international law.

States, Individuals, and Non-State Entities As Subjects of International Law

As stated above, the sovereignty of the state has been a key element of the international system since at least 1648. For centuries after the Peace of Westphalia, states were considered the sole actors and subjects of international law. However, if states are no longer the sole subjects of the law, can their sovereignty be considered absolute? In the past half-century, individuals and other non-state entities have emerged to take their place in the international system as well. Other developments in international relations have likewise undermined the absolute sovereignty of states, thereby weakening one of the primary doctrines supporting nonintervention.

Most of the international legislation concerning individuals emerged after the Second World War. However, precursors can be seen in the early twentieth century. In 1907, a treaty establishing the Central American Court of Justice provided for individuals as plaintiffs (Shaw 1997: 183); until that time, states brought cases before courts on behalf of their nationals. In a similar vein, the Treaty of Versailles allowed individuals to make claims against Germany (ibid.). However, most of the legislation recognising individuals as parties to international law

concerned human rights and was written after 1945. The Universal Declaration on Human Rights (1948) outlines specific freedoms to be enjoyed by individuals. In its directive nature concerning these rights, the UDHR appears to undermine the sanctity of domestic sovereignty enshrined in the UN Charter's Article 2(7). For example, Articles 9 through 11 deal with the nature of domestic legal systems, while Article 13(1) addresses freedom of movement within the state. The International Covenant on Economic, Social, and Cultural Rights (ICESCR) also deals with individuals as subjects of international law and enumerates their rights. Like the UDHR, this Covenant appears to undermine the concept of state sovereignty in order to guarantee the rights of individuals. Article 16 requires states that are parties to the convention to submit reports concerning their progress to the UN, subjecting domestic legislation to international scrutiny. The International Covenant on Civil and Political Rights (ICCPR), as a companion to the ICESCR, is similarly focused on the individual. Like the UDHR and ICESCR, it seems to place individual rights over those of the state; for example, Articles 6, 7, and 8(3) limit the state's sovereignty in penal matters. Like the ICESCR, it also requires States Parties to submit reports to the United Nations. Further examples of legislation treating individuals as subjects of international law include the European Convention on Human Rights (1950), the Geneva Convention on Refugees (1951) and its 1967 Protocol, and proposed covenants protecting the rights of women and children.

There are other domains besides human rights in which individuals have joined states as actors in the international structure. International criminal law has established the exposure of individuals to international prosecution. Many crimes for which an individual may be held accountable before an international tribunal concern war crimes; others include piracy and slavery (Shaw 1997: 184; Cassese 2001: 186). The important aspect is that individuals are thus held as subjects of international law.

To a limited extent, other non-state entities enjoy international legal personality. International organisations are one example; in *Scarfo v Sovereign Order of Malta* (24 ILR 1 1957, Tribunal of Rome) the tribunal found 'there can be no doubt that the order of Malta is a sovereign entity and subject of international law' (Dixon and McCorquodale 2000: 159). In some cases, multinational corporations have also been considered international persons. In the case of *Texaco v the Libyan Arab Republic* (53 ILR 1977 389), the arbitrator made reference to 'the concept that legal international capacity is not solely attributable to a state and that international law encompasses subjects of a diversified nature' (Dixon and McCorquodale 2000: 160).

It should be pointed out, on the other hand, that the UDHR is not legally binding and that the Covenants are binding only on signatories; therefore, domestic sovereignty on specific issues is only diminished with the consent of states. Furthermore, only states are considered to possess full legal status; other subjects (individuals, organisations, or national liberation movements) have limited capacity to claim rights or enter international obligations (Cassese 2001:47). However, the legislation, as a whole, indicates that states are no longer the sole actors in international relations and that their domestic sovereignty is no longer considered sacrosanct. Thus, the idea of state sovereignty has been diluted by the introduction of other actors and by specific provisions that limit domestic independence.

The supremacy of state sovereignty is also undermined by such organs as the European Union. Certain activities that have been indisputably the domain of national governments have been surrendered to such supranational organisations, weakening the primacy of domestic sovereignty. For example, most EU states have surrendered their fiscal policy and national currency. Perhaps more importantly, domestic courts now find themselves subordinated to a supranational body; in

the Factortame case, the European Court of Justice 'was unwilling to allow domestic law to prevent protection of rights under European Community law' (Peele 1995:471). Peele further states 'the ECJ can be regarded not merely as the constitutional court of the European Union but also as the superior court of the British legal order, since the ECJ has the power to overrule cases from the House of Lords and to adjudicate in conflicts between a British statute and European law' (Peele 1995: 494). Other areas in which the EU impinges on domestic control include agriculture, employment policy, and education.

SECTION 2: THE LEGAL FRAMEWORK REGARDING INTERVENTION

The Primary Source Regarding Intervention: The United Nations Charter

As stated above, the United Nations Charter emphasises the peaceful resolution of conflict and is written in such a way as to be very restrictive on the use of force. Several articles of the Charter have direct bearing on the subject of humanitarian intervention and form the legal framework regarding the matter.

The first of these is Article 2(4), which reads: "All states shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations." (Brownlie 1995: 3-4). Some states have argued that humanitarian intervention does not impinge on the 'territorial integrity or political independence' of another state, since no permanent acquisition of land or governing authority is envisioned. However, this argument has not been widely accepted (Shaw 1997: 802). It should be noted that 'force' in the context of the article is

limited to military action; Brazil introduced an amendment to include economic coercion, but it was rejected (Cassese 2001: 101). Furthermore, the article only applies to incidents between states; therefore, the use of force against 'insurgents,' 'guerrillas,' or 'terrorists' in a state's own territory is not banned (Cassese 2001: 101). This could create the situation where an intervening state acts in violation of Article 2(4), while the state committing the abuses necessitating intervention does not violate the article.⁴

Article 2(7) relates specifically to the sovereignty of states. It reads, 'Nothing contained in the present Charter shall authorise the United Nations to intervene in matters that are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII'. It is in this article that one sees the primacy of sovereignty, which developed over the centuries as described previously in this paper. By limiting the power of the UN to influence the internal activities of states, this article makes enforcement of human rights standards difficult. At the time of the drafting of the Charter, there was no consensus on what rights were universally held nor a definition of these rights (Cassese 2001: 288-289)⁵. It was deemed more important to respect the rights of states to determine these matters for their citizens than to open up the possibility of external interference in domestic matters.

⁴ Naturally, the abusing state violates other provisions of the Charter and other norms of law; however, this example illustrates the problems with the article unforeseen at the time of its drafting.

⁵ The Universal Declaration on Human Rights was completed in December 1948. It was a compromise between the concept of human rights held by Western states and those in the Socialist and developing world; it therefore was a 'least common denominator' approach, although favouring the Western notion of political and individual freedoms over economic and social ones. Furthermore, the document is not legally binding, although some provisions could become norms of customary international law. See Cassese 2001:357-359.

Chapter VII, alluded to in Article 2(7), provides a process for the exceptional cases in which force is deemed necessary by the UN. These exceptions are covered primarily in Article 39, which authorises collective force if the UN Security Council (UNSC) determines that a 'threat to the peace, breach of the peace, or act of aggression' has occurred (UN web site). Defining a 'threat to the peace' can be very difficult, and states can cite a wide variety of circumstances as constituting such a threat. In cases of humanitarian intervention, it is this clause that is often used as justification.⁶ The ability of the UNSC to invoke Article 39 is limited, however, by the veto power of the five Permanent Members. If such a resolution runs counter to the interests of the US, Russia, China, France, or the UK, it is unlikely to pass. With the end of the Cold War, however, there has been an increase in the number of Article 39 findings (Shaw 1997: 855-856).

In those cases where a resolution is passed, the UNSC can use its powers under Article 41 to impose measures short of the use of force. These may include 'complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.' (University of Minnesota Human Rights Library website). Article 41 measures may fail, or may be deemed insufficient by the UNSC. In either case the UNSC can invoke the powers of Article 42 (provided an Article 39 finding exists). This article authorises 'such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security.' (ibid.). Like Article 41, a resolution under Article 42 is binding on all members of the UN. This does not mean that all members must participate in military operations, but they cannot work counter to the UN effort.

⁶ Shaw states 'In another move of considerable importance, the Council has also determined that "widespread violations of international human rights law" constitutes a threat to peace.' He cites specifically UNSCR 808 (1993) concerning Yugoslavia and UNSCR 955 (1994) on Rwanda. See Shaw 1997: 856.

The original intent of the Charter was to create a 'UN Corps' of military forces to carry out Chapter VII actions. Articles 43 through 45 mandate that member states make portions of their national forces available for this purpose; Articles 46 and 47 call for the creation of a Military Staff Committee to provide strategic direction for military action (Brownlie 1995: 15-16). Due to Cold War politics and other factors, the provisions of Articles 43-45 have never been carried out. Instead, UN actions have been led by a militarily strong member (usually the US) acting in the name of the UNSC. Similarly, the Military Staff Committee has not functioned as intended, with the exception of the Gulf War in 1991.

Article 51 provides for 'individual or collective self-defence' (UN web site), that is, the right to defend against an armed attack until the UNSC has been able to consider and enact Chapter VII actions. It is worth noting two cases that shed light on the applicability of Article 51 to intervention: the Corfu Channel Case and the Nicaragua Case. In both cases, states asserted a right of intervention based on the notion of 'self-help' found in Article 51 and elsewhere in the Charter. According to such claims, the failure of the international system to prevent violations of law or human rights justified unilateral intervention.

The Corfu Channel Case was heard in 1949 and was the first case considered by the International Court of Justice (ICJ). Albania had mined portions of the Corfu Channel, which although territorial waters of Albania, were considered an 'international highway.' This status gave other states the right of innocent passage through the channel. After two British ships were damaged by mines, the UK intervened in Albanian waters to clear the passage and secure evidence of the Albanian mining (Collins 1970: 194-198). In ruling that the intervention was unlawful, the court stated 'The Court can only regard the alleged right of intervention as a policy of force, such as has, in the past, given rise to the most serious abuses and such as cannot, whatever be the present

defects in international organisation, find a place in international law.' (Chesterman 2002: 54).

In 1986 the ICJ further clarified the prohibition on intervention in the Nicaragua Case.

Nicaragua had sued the United States, alleging that its support of anti-government guerrillas and the mining of its harbours constituted an illegal intervention. According to the US, the failure of the international community to respond to human rights violations left the Nicaraguan people no recourse other than to seek assistance from the U. S.; this, therefore, constituted 'collective self-defence' as authorised by Article 51. The ICJ rejected this argument, maintaining its view of intervention elaborated in the Corfu Channel case (Chesterman 2002: 60-62 and 92-94).

SECTION 3: Kosovo As An Illustrative Example

The NATO intervention in the Federal Republic of Yugoslavia (FRY) in 1999 provides a useful vehicle for examining the issues relating to humanitarian intervention. Some scholars classify the intervention as a violation of international law. Others argue that it reveals the failure of the UN Charter to meet the needs of the modern world, both in the rigidity of Articles 2(4) and 2(7) and in the mechanism provided under Chapter VII for the rare occasions when variance is authorised. In examining the lessons of the Kosovo intervention, the following questions will be addressed in turn:

- Was the NATO intervention in Kosovo illegal under current international law?
- Has a customary norm of international law developed affirming the right of states to intervene in humanitarian crises without authorisation from the UN Security Council (UNSC)? If so, on what basis? If not, is such a norm evolving?
- What are the implications of the Kosovo intervention for the law concerning humanitarian intervention?

Legality of the NATO Intervention

The first step in this analysis is to ascertain whether NATO's actions conformed to the requirements of the UN Charter. In order to do this, one examines the relevant UNSC resolutions.

The first resolution, UNSCR 1160 (31 March 1998), was passed early in the situation. Although invoked under the provisions of Chapter VII, the resolution did not meet any of the Article 39, 41, or 42 provisions. It merely condemned the violence on both sides in an attempt to defuse the situation (Chesterman 2002: 207-208). The resolution imposed an arms embargo and confirmed support for a peaceful end to the conflict. In keeping with the UN's emphasis on state sovereignty, the resolution expressed support for negotiations that would maintain the territorial integrity of Yugoslavia while granting greater autonomy to Kosovars.

The fighting continued, and two months following the passage of UNSCR 1160 the US-sponsored peace talks broke down (Chesterman 2002: 208). Over the next four months human rights abuses became more common, and the UN passed UNSCR 1199 (23 September 1998). This resolution went as far as to term the crisis a 'threat to the peace,' but interestingly 'to the region' rather than on an international scale. It also fell short of authorising force, threatening only to '...consider further action and additional measures...' should Belgrade not comply with terms mandated in the resolution (Chesterman 2002: 208). The failure of this resolution to invoke Articles 39 and 42 was due to the threat of veto by the Russian delegation (Crossette 1998: 1). It became clear to the NATO members that Russia, and perhaps China, would prevent any Chapter VII action from occurring. A short time later two incidents occurred in which Serb paramilitary forces killed unarmed Kosovars. NATO prepared its air forces for a campaign

against Yugoslavia, but announced a ninety-six hour pause to allow for Belgrade to agree to the UN's conditions. An agreement between NATO and Yugoslavia was signed after two days. In the agreement, Belgrade pledged to abide by UNSCRs 1160 and 1199, and allowed for an OSCE verification mission in Kosovo (Chesterman 2002: 209).

The final resolution, UNSCR 1203 (24 October 1998), endorsed the NATO-Yugoslavia agreement, but still avoided direct use of Article 39 or 42 language. Instead it used the phrase 'action may be needed' should Belgrade not comply with agreed provisions (Chesterman 2002: 209-210).

In spite of the agreement, little changed concerning human rights abuses in Kosovo. In January 1999, Serbian forces killed forty-five unarmed civilians in the village of Racak. Once again NATO prepared for air attacks in an effort to force Belgrade into talks. President Milosevic agreed, and negotiations began in Rambouillet and Paris. NATO's conditions were rejected by Belgrade. NATO, realising Russia would veto any Chapter VII authorisation, commenced its air campaign on 24 March 1999 (Chesterman 2002: 210).

The day the air campaign began (24 March 1999), the UNSC was called into emergency session where Russia, China, Belarus, and India asserted that a violation of the Charter had been committed by NATO. Of those members favouring the intervention, only two (UK and the Netherlands) proposed that the act was legal under the Charter. The others side-stepped the issue by claiming this was an exceptional circumstance rather than take on the issue of prior UNSC approval (Chesterman 2002: 211-212). The positions of the NATO states were further

elaborated in arguments before the ICJ when Belgrade brought the ten states that participated in the campaign to trial for violating the Charter⁷. These states presented arguments including:

- the intent (if not the letter) of the resolutions
- a supposed doctrine of humanitarian intervention
- the principle of necessity.

Chesterton rejects these claims, since:

- at best, one could argue that the resolutions gave implicit authorisation when explicit authorisation is required (*ibid.*, 212);
- no legal precedents have yet indicated that humanitarian intervention is compatible with the Charter, as Belgium asserted (*ibid.*, 213), and as stated earlier in this paper the ICJ has explicitly ruled against this concept in the *Corfu* and *Nicaragua* cases
- the situation fell short of the requirements for the 'state of necessity'.

This last argument warrants further discussion because Belgium's claim of a 'state of necessity' is unique in the history of humanitarian interventions. The ICJ cites Article 33 of the International Law Commission's Draft Articles on the Origin of State Responsibility (1980) as authoritative on this matter. The Article reads, in part, that an attack is lawful only if it is the sole means of protecting 'an essential interest of the State from grave and imminent peril' while not threatening a similar interest of another state (Brownlie 1995: 436). This position is reaffirmed by the ICJ in the case of *Gabcikovo v. Nagymaros* (Chesterman 2002: 214). Such a claim by Belgium regarding the situation in Kosovo would be tenuous.

⁷ Belgrade sought for the ICJ to impose provisional actions against NATO in order to end the campaign. The ICJ ruled that it did not have jurisdiction in the matter. See Dixon and McCorquodale 2000: 617-618).

Based on the lack of UNSC authorisation and the failure of NATO's legal arguments, one would have to conclude that NATO's actions did indeed violate international law as embodied in the UN Charter.

Does an Overriding Customary Norm of International Law Exist?

One next turns to the other source of international law: custom. There have been many instances since 1945 of unilateral intervention⁸. The question is whether the threshold has been reached at which point a customary norm has been established granting states the right to intervene in humanitarian crises unilaterally.

In asserting the development of such a norm, Belgium cited the following cases in which unilateral humanitarian intervention occurred: India in East Pakistan; Tanzania in Uganda; Vietnam in Cambodia; and ECOMOG in Liberia and Sierra Leone (Chesterman 2002: 46). However, repetition of an act that contravenes a treaty does not in and of itself lead to the treaty's modification. In the international system, 'treaties are clearly superior to customary practice as a source of legal obligation.' (Collins 1970: 286).

In order for a practice to become a norm of customary international law, there must also be an *opinio juris*. This means that states conducting the practice do so out of a sense of legal obligation, rather than as optional conduct (Shaw 1997: 59). No state has successfully argued that an *opinio juris* existed in any of the interventions cited above.

⁸The term 'unilateral intervention' can be confusing, since it could mean either an action by a single state or an action carried out without UN authorisation. In this paper, the term 'unilateral intervention' refers to the latter, since this is in keeping with current literature. For example, Dixon and McCorquodale (p. 552) define unilateral as

Furthermore, the thresholds for state use and *opinio juris* may be different in the case of humanitarian intervention than in other situations. According to the Martens Clause⁹, norms involving ‘laws of humanity’ and ‘dictates of public conscience’ have a lower threshold of past state practice, yet a higher threshold concerning *opinio juris*. Cassese notes that the Martens clause ‘loosens, in the limited area of humanitarian law, the requirements prescribed for (past state practice) while ...elevating *opinio juris* to a rank higher than that normally admitted’ (Cassese 2001: 122). With the Martens clause in mind, Belgium’s claim may meet the lowered standard for state practice but falls short of the raised standard for *opinio juris*.

Fernando Teson takes a different approach, citing the principle of *clausula rebus sic stantibus* (Chesterman 2002: 56). According to this principle, a treaty is no longer valid if there is a fundamental change in a condition that was essential to its adoption. Teson asserts that the failure of the Charter system to prevent humanitarian catastrophes represents a fundamental change in the conditions assumed by the member states on signing the charter; this fundamental change allows variance from the treaty. However, this approach also fails. Not all jurists agree with the notion of *rebus sic stantibus*, and in fact Article 62 of the Vienna Convention on the Law of Treaties specifies only very limited circumstances in which this principle applies (Vienna Convention).

Is There A Trend Toward A Norm of Unilateral Intervention?

In the Kosovo case, the reaction of the international community to the unilateral intervention was not a strong condemnation but rather tacit approval. For example, the Russian-sponsored draft

‘occur(ing) without the authorisation of a competent international organisation, such as the Security Council of the United Nations.’

resolution to condemn the air strikes failed 12-3. This is noteworthy, not solely because of the numbers, but also because of the non-NATO states that voted against the resolution: Argentina, Brazil, Gabon, Gambia, Malaysia, and Slovenia (Chesterman 2002: 213). These countries are geographically and ideologically diverse. Furthermore, no emergency meeting of the General Assembly was called. The lack of vigorous reaction to an apparent violation of the Charter implies that international consensus in support of Chapter VII is weakening and that a norm of unilateral intervention may be established in the future.

Cassese cites several other trends indicating a change in the world's attitude toward unilateral intervention (Cassese 2002: 3-4). These include:

- a sense of community responsibility for human rights superseding earlier notions that responsibility fell exclusively on the state involved
- increased unilateral intervention
- a growing sense that "peace" is not merely the absence of conflict, but includes the guarantee of human rights (ibid.)

Although Cassese agrees that NATO's action violated international law as it exists today, he disagrees with those such as Simma and Chesterman who feel the intervention would harm the international system of maintaining peace. He cites several reasons why the intervention, while illegal, was justified. Among these are the undisputed atrocities, previous attempts at a peaceful settlement, group (i.e. NATO) decision to carry out the intervention, and the previously mentioned lack of condemnation from the international community as a whole.

⁹ Found in the preamble of the 1898 Hague Convention II. See Cassese 2001:121-122.

Section 4: Summary and Conclusions

The debate over the legitimacy of military force to end humanitarian crises centres on the tension between two legally and ethically legitimate concepts: the right of the state to enjoy sovereignty and the rights enjoyed by individuals by virtue of their humanity. Under normal circumstances, these concepts can co-exist without conflict; humanitarian intervention exists in the zone of conflict between them, in which the two cannot be reconciled.

The concept of sovereignty developed centuries ago, as princes required absolute authority in order to maintain stability in their dominions. The sovereignty of the state became supreme in the seventeenth century, when supranational institutions (the Church and the Holy Roman Empire) lost their authority and individual sovereigns were superseded by the nation-state as the central actor and sole subject of international law. From the Peace of Westphalia through the late twentieth century, the centrality of state sovereignty to international relations was never seriously challenged.

A corollary to the inviolability of state sovereignty is the notion that states may not intervene in the domestic affairs of other states. While legal writings through the centuries have underscored this notion, state practice over the years has shown a tendency to intervene when circumstances (usually Machiavellian) warranted. It was only after the Second World War that nonintervention clearly became a norm of international law. This did not stop interventions from occurring, and ironically the justification was often more ethically sound (human rights) than in the past, when the existence of such a norm was questionable.

The post-war era also saw the solidification of the primacy of state sovereignty in the form of the UN Charter's Article 2(7). However, at the same time the international community was drafting treaties that could be construed as undermining this concept. First, the centrality of the state in the international system was challenged by the emergence of non-state actors as subjects of international law. Secondly, provisions of some treaties or regional charters impinged on areas that were historically the prerogative of domestic authorities.

Many of these treaties that challenged the primacy of state sovereignty dealt with human rights. The last decades of the twentieth century, particularly after the Cold War, witnessed an increasing sense in the international community that human rights were a responsibility of all. Peace, as Cassese pointed out, is no longer considered the absence of warfare between states, there is also the sense that the world is not at peace if the fundamental rights of individuals are being violated (Cassese 2001: 4)

There have been many cases in the past decade that bear witness to this conflict between sovereignty and human rights: the Gulf War (specifically the establishment of No Fly Zones), Bosnia, Rwanda, and Liberia to name a few. The Kosovo intervention is representative in illustrating the ambivalence of the international community on this issue. While the action was not justified by UN mandate nor any norm of customary international law, the reaction of many jurists and a significant portion of the UN member states indicates a trend toward a norm of humanitarian intervention.

Should such a norm develop, there is a danger that it could lead to constant warfare or could be used as an excuse by more powerful states to attack weak neighbours. For this reason such a

norm, should it emerge, must be limited. The international community would have to reach agreement on the conditions warranting intervention on humanitarian grounds. While Chapter VII of the UN Charter could be viewed as an effort to establish such criteria, it is vague by nature and subject to negation by a single veto.

In the end, there are no easy solutions because the dilemma involves not right versus wrong, but right versus right. At present, the presumption remains on the side of sovereignty. However, if current trends continue, states may find themselves justifying inaction, rather than the use of military force.

APPENDIX

RELEVANT TREATY ARTICLES CITED

1. Covenant of the League of Nations, Article 16(2):

'It shall be the duty of the Council in such case **to recommend** to the several Governments concerned what effective military, naval, or air force the Members of the League shall severally contribute to the armed forces to be used to protect the covenants of the League' (emphasis added) (Collins 1970: 339)

2. Charter of the United Nations

Article 2(4):

'All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.'

Article 2(7):

'Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.'

Chapter VII:

Article 39

The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.

Article 40

In order to prevent an aggravation of the situation, the Security Council may, before making the recommendations or deciding upon the measures provided for in Article 39, call upon the parties concerned to comply with such provisional measures as it deems necessary or desirable. Such provisional measures shall be without prejudice to the rights, claims, or position of the parties concerned. The Security Council shall duly take account of failure to comply with such provisional measures.

Article 41

The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.

Article 42

Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.

Article 43

1. All Members of the United Nations, in order to contribute to the maintenance of international peace and security, undertake to make available to the Security Council, on its call and in accordance with a special agreement or agreements, armed forces, assistance, and facilities, including rights of passage, necessary for the purpose of maintaining international peace and security.
2. Such agreement or agreements shall govern the numbers and types of forces, their degree of readiness and general location, and the nature of the facilities and assistance to be provided.
3. The agreement or agreements shall be negotiated as soon as possible on the initiative of the Security Council. They shall be concluded between the Security Council and Members or between the Security Council and groups of Members and shall be subject to ratification by the signatory states in accordance with their respective constitutional processes.

Article 44

When the Security Council has decided to use force it shall, before calling upon a Member not represented on it to provide armed forces in fulfilment of the obligations assumed under Article 43, invite that Member, if the Member so desires, to participate in the decisions of the Security Council concerning the employment of contingents of that Member's armed forces

Article 45

In order to enable the United Nations to take urgent military measures, Members shall hold immediately available national air-force contingents for combined international enforcement action. The strength and degree of readiness of these contingents and plans for their combined action shall be determined within the limits laid down in the special agreement or agreements

referred to in Article 43, by the Security Council with the assistance of the Military Staff Committee.

Article 46

Plans for the application of armed force shall be made by the Security Council with the assistance of the Military Staff Committee.

Article 47

1. There shall be established a Military Staff Committee to advise and assist the Security Council on all questions relating to the Security Council's military requirements for the maintenance of international peace and security, the employment and command of forces placed at its disposal, the regulation of armaments, and possible disarmament.
2. The Military Staff Committee shall consist of the Chiefs of Staff of the permanent members of the Security Council or their representatives. Any Member of the United Nations not permanently represented on the Committee shall be invited by the Committee to be associated with it when the efficient discharge of the Committee's responsibilities requires the participation of that Member in its work.
3. The Military Staff Committee shall be responsible under the Security Council for the strategic direction of any armed forces placed at the disposal of the Security Council. Questions relating to the command of such forces shall be worked out subsequently.
4. The Military Staff Committee, with the authorization of the Security Council and after consultation with appropriate regional agencies, may establish regional sub-committees.

Article 48

1. The action required to carry out the decisions of the Security Council for the maintenance of international peace and security shall be taken by all the Members of the United Nations or by some of them, as the Security Council may determine.
2. Such decisions shall be carried out by the Members of the United Nations directly and through their action in the appropriate international agencies of which they remember.

Article 49

The Members of the United Nations shall join in affording mutual assistance in carrying out the measures decided upon by the Security Council.

Article 50

If preventive or enforcement measures against any state are taken by the Security Council, any other state, whether a Member of the United Nations or not, which finds itself confronted with

special economic problems arising from the carrying out of those measures shall have the right to consult the Security Council with regard to a solution of those problems.

Article 51

Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

(UN Website, <http://www.un.org/aboutun/charter/index.html>)

Universal Declaration on Human Rights

Article 9:

‘No one shall be subjected to arbitrary arrest, detention, or exile.’

Article 10:

Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.’

Article 11:

- (1) Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.
- (2) No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed.’

Article 13(1):

‘Everyone has the right to freedom of movement and residence within the borders of each state.’

(Brownlie 1995: 257-258)

4. International Covenant on Economic, Social, and Cultural Rights

Article 16:

'The States Parties to the present Covenant undertake to submit in conformity with this part of the Covenant reports on the measures which they have adopted and the progress made in achieving the observance of the rights recognised herein.'
(Brownlie 1995: 271)

5. International Covenant on Civil and Political Rights

Article 6:

- (1) 'Every human being has a right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.'
- (2) In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgement rendered by a competent authority.
- (3) When deprivation of life constitutes the crime of genocide, it is understood that nothing in this article shall authorise any State Party to the present Covenant to derogate in any way from any obligation assumed under the provisions of the Convention on the Prevention and Punishment of Genocide.
- (4) Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon, or commutation of the sentence of death may be granted in all cases.
- (5) Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women.
- (6) Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant.

Article 8(3):

'No one shall be forced to perform forced or compulsory labour.'

(Brownlie 1995: 278-280)

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